the terms of the written notice.[15] Others admit such evidence,[16] even though the bidder knew nothing of the change in terms.[17] While still a third class would limit its effect to cases where it can be shown that the bidder knew of the parol modification of the conditions of sale as previously announced.[18] Of these views, the second seems preferable. The vendor makes no representations that the terms shall remain unchanged; the advertisement would hardly amount to a written instrument within the parol evidence rule; the conditions are no part of the contract of sale before the fall of the hammer; and the weight of authority would compel the bidder to determine at his peril the exact terms under which he is bidding.[19]

An attempt is seen in the recent New York case of *City of New York* v. *The Union News Co.* (App. Div., 1st Dep., 1915) 154 N. Y. Supp. 638, to extend the vendor's privilege of withdrawal further than has yet been possible. The dock-commissioner of the plaintiff announced in an advertisement, that certain privileges would be sold at the time specified in the notice to the highest bidder, and by the same means announced that the right was reserved to reject "any or all bids, if in his judgment he deems it for the best interests for the City of New York so to do." The defendant became the highest bidder and the privilege was knocked down to it. Thereafter, the plaintiff attempted to exercise its right of rejection. The court refused to allow it, saying that this right could only be exercised before the fall of the hammer. All authority in point is in accord with this decision,[20] and in so holding the court was clearly correct on principle. For admitting that if the reservation were applied only to the rejection of bids before their acceptance it would give the plaintiff no right which it did not already possess, nevertheless the extension of the privilege of rejection would destroy all mutuality in the resulting contract and virtually permit a rescission by one party.

RESIDENCE OF THE PLAINTIFF IN A SUIT FOR DIVORCE AS A BASIS OF JURISDICTION.—The doctrine that the courts of a State and the acts of its legislature exist primarily for the benefit of the citizens of that State,[1] forms the basis of the rule requiring the plaintiff in a suit for divorce to prove that he has a permanent residence within the State.[2]

[15]Chouteau *v.* Goddin (1866) 39 Mo. 229; Gunnis *v.* Erhart (1789) 1 H. Bl. 289; Powell *v.* Edmounds (1810) 12 East 6; Johnson *v.* Buck (1872) 35 N. J. L. 338.

[16]Eisenhauer *v.* Brosnan (1892) 44 La. Ann. 742; Morrison *v.* Morrison (Pa. 1843) 6 Watts & S. 516; Ashcom *v.* Smith (Pa. 1830) 2 P. & W. 211; Satterfield *v.* Smith (1849) 33 N. C. 60.

[17]Vanleer *v.* Fain (1845) 25 Tenn. 104; Wainright *v.* Read (S. C. 1797) 1 Desauss. Eq. 573; Cannon *v.* Mitchell (S. C. 1805) 2 Desauss. Eq. 320; Kennell *v.* Boyer (1909) 144 Iowa 303.

[18]Marston *v.* Waldrhyn (1802) 2 Ky. 112; Nott *v.* Oakey (1841) 19 La. 18. See also Porter *v.* Liddle (La. 1819) 7 Mart. 23.

[19]Bailey *v.* Peters (1906) 28 Ohio C. C. 823 and cases in note 16, *supra*.

[20]Kerr *v.* City of Phila. (Pa. 1871) 8 Phila. 292; Brown *v.* City of New York (N. Y. 1908) 57 Misc. 433, affd. 128 App. Div. 925.

[1]Hinds *v.* Hinds (1855) 1 Iowa 36; Bechtel *v.* Bechtel (1907) 101 Minn. 511.

[2]Yelverton *v.* Yelverton (1859) 1 Swabey & J. 574; Way *v.* Way (1872) 64 Ill. 406.

If, as a matter of fact, he has no such residence, the court has no jurisdiction, and any decree it may render will have no extra-territorial effect and may be impeached in any other State even though the record recites the facts necessary to constitute jurisdiction.[3] The plaintiff who has fraudulently invoked the jurisdiction of the court, however, may not subsequently attack the decree.[4] If the plaintiff has a permanent residence in the State, that fact alone is sufficient to give the court jurisdiction to render a decree valid within the State, although the extra-territorial effect, since the case of *Haddock* v. *Haddock*,[5] may depend upon the presence of additional facts. It will be seen that in any case the minimum requirement of jurisdiction is the permanent residence of the plaintiff.

The common law has expressed the requisities of this type of residence by the word domicil which combines the *factum* of residence with the *animus manendi*,[6] and which is regarded as continuing even during the physical absence of the owner, till a new one is acquired *animo et facto*.[7] But in the majority of States the common law has been superseded on this point by statutes requiring that the plaintiff in a divorce suit have a residence for a specified period within the jurisdiction,[8] thus raising the question as to whether a change has been made in the common law rule. Residence is strictly intermediate between domicil and *situs*, or mere physical presence,[9] but in these statutes it is generally construed as synonymous with domicil,—that is, the plaintiff must intend to remain permanently in the jurisdiction.[10] There is usually a further requirement, express or implied, that the plaintiff be a resident in good faith, which is generally construed as meaning the absence of an intent to come into the jurisdiction solely for the purpose of getting a divorce.[11] In a few jurisdic-

[3]German Savings Bank So. *v.* Dormitzer (1904) 192 U. S. 125; Andrews *v.* Andrews (1900) 176 Mass. 92. 3 Columbia Law Rev., 356.

[4]Swales *v.* Swales (1902) 172 N. Y. 651. The inconsistencies and practical difficulties arising from this doctrine are discussed in 13 Columbia Law Rev., 241.

[5]Haddock *v.* Haddock (1906) 201 U. S. 562. The decree will not be obligatory upon other states unless there was personal service on the defendant, or the matrimonial domicil was in the State of the forum.

Before this decision, many courts considered the mere residence of the plaintiff sufficient to give extra-territorial effect to the decree. Gould *v.* Crow (1874) 57 Mo. 200; Ditson *v.* Ditson (1856) 4 R. I. 87; Johnson *v.* Johnson (1896) 57 Kan. 343.

[6]Harral *v.* Harral (1884) 39 N. J. Eq. 279; Way *v.* Way, *supra*; 10 Columbia Law Rev., 360.

[7]Watkinson *v.* Watkinson (1904) 68 N. J. Eq. 632; Bechtel *v.* Bechtel, *supra*.

[8]Thelen *v.* Thelen (1899) 75 Minn. 433; Sewall *v.* Sewall (1877) 122 Mass. 156.

[9]12 Columbia Law Rev., 460.

[10]Smith *v.* Smith (1898) 7 N. D. 404; Hamil *v.* Talbot (1899) 81 Mo. App. 210; Andrews *v.* Andrews, *supra*. Some statutes have been interpreted as requiring actual physical residence. Tipton *v.* Tipton (1888) 87 Ky. 245; Fleming *v.* Fleming (1913) 36 Nev. 135. The plaintiff has acquired a residence while travelling in the state looking for a place to settle permanently. King *v.* King (1908) 74 N. J. Eq. 824; see Winans *v.* Winans (1910) 205 Mass. 388; *cf.* Hall *v.* Hall (1870) 25 Wis. 600.

[11]Beach *v.* Beach (1896) 4 Okla. 359; Smith *v.* Smith, *supra*; see Doeme *v.* Doeme (N. Y. 1904) 96 App. Div. 284.

tions, however, the good faith required of the plaintiff need only be the *animus manendi*, and if this can be proved, he may sue for divorce, even though he came to the jurisdiction for that very object.[12] Such a motive, however, even if it is not bad faith, affords a strong presumption that when the temporary purpose has been accomplished, the plaintiff will leave the state.[13] In the recent case of *Presson* v. *Presson* (Nev. 1915) 147 Pac. 1081, the jury found that the plaintiff had come to Nevada just to get a divorce and intended to return to the State from which she came, immediately upon the granting of the decree. The court held that she was not a resident and there was no jurisdiction of the suit, following the above well-established rule. In thus enforcing the strict requirements of the common law the court is pursuing a wise policy, for when a citizen of one State goes to another to obtain a divorce which the laws of his own will not grant him, he is practicing a fraud upon both States.[14] The facility with which he may manufacture evidence in such a case especially in an *ex parte* proceeding, requires the strictest examination by the court of his good faith and intent to remain permanently.

In England the foregoing discussion is applicable only to the husband, for the fiction of identity of husband and wife has prevented the wife from acquiring any domicil other than that of her husband.[15] But in this country the courts have developed many exceptions to the rule in cases where the theory of identity is palpably untrue. It is generally admitted, even where the rule is most strictly applied, that the wife may acquire a domicil of her own whenever her husband's conduct is such as to entitle her to a divorce.[16] In such a case, having relinquished his marital protection and control, he no longer has a right to establish the matrimonial domicil.[17] Some jurisdictions have even gone so far as to discard the rule where a separation has taken place.[18] *A fortiori*, the husband by his wrongful desertion of the wife, cannot deprive her of the domicil she has already acquired.[19] The fiction has also been disregarded in cases where the wife, being entitled to acquire a new domicil through the husband's desertion or misconduct, sues him in the jurisdiction where she finds him and claims that she is a resident of the State because he is.[20] The conflict on this last point, however, appears to be due rather to the interpretation of statutes requiring residence than to any doubt as to the inapplicability of the

[12]Fosdick *v.* Fosdick (1885) 15 R. I. 130; Colburn *v.* Colburn (1888) 70 Mich. 647.

[13]Hunter *v.* Hunter (N. J. 1902) 53 Atl. 221.

[14]See Andrews *v.* Andrews (1902) 188 U. S. 14.

[15]Yelverton *v.* Yelverton, *supra*; see Kashaw v. Kashaw (1853) 3 Cal. 312; Burlen *v.* Shannon (1874) 115 Mass. 438.

[16]Cheever *v.* Wilson (1869) 76 U. S. 108; Clark *v.* Clark (1906) 191 Mass. 128. The burden is on the wife to establish the *delictum* entitling her to a new domicil. Kendrick *v.* Kendrick (1905) 188 Mass. 550. The rule has been codified in New York. N. Y. Code Civ. Proc., § 1768; Gray *v.* Gray (1894) 143 N. Y. 354.

[17]Barber *v.* Barber (1858) 62 U. S. 582.

[18]Johnson *v.* Johnson, *supra*; Chapman *v.* Chapman (1889) 129 Ill. 386; Sylvester *v.* Sylvester (1899) 109 Iowa 401.

[19]Barber *v.* Barber, *supra*.

[20]Hopkins *v.* Hopkins (1857) 35 N. H. 474; Dutcher *v.* Dutcher (1876) 39 Wis. 651; Pate *v.* Pate (1878) 6 Mo. App. 49. *Contra*, Dunlop *v.* Dunlop (1881) 3 Ky. L. R. 20; Kashaw *v.* Kashaw, *supra*.

fiction. In view of the large number of exceptions, therefore, it is not surprising that the Supreme Court has recently called it "the now vanishing fiction of identity of person."[21] In this country, then, unless the wife has wrongfully deserted her husband, she may acquire a residence in a jurisdiction other than that of her husband and if she does so *bona fide* and with the intention of remaining, she may sue for divorce as a resident within the meaning of the divorce statutes.

EFFECT OF FAILURE TO EMBODY A CONTRACT IN A FORMAL DOCUMENT AS INTENDED.—The sufficiency of a contract by mere offer and acceptance without the execution of a contemplated formal instrument, in cases where the Statute of Frauds does not apply, has given rise to much litigation. The general underlying principle is well settled, but the application to particular cases is by no means easy. Consequently courts have adopted certain standards to aid them in determining the true intent of the parties.

There are, however, two distinct lines of cases where the intention of the parties is so clearly expressed that the solution consists in merely carrying it out. In the first group, the embodiment of the terms of a contract in a formal instrument is made one of the conditions of the agreement. Here, obviously, until such agreement is executed, either party may recede, for the offer is not accepted in all its terms until the formal document is signed.[1] In contrast with these cases, are those in which there is nothing more than a mere suggestion during the course of the negotiations that a more formal written contract is to be executed. The recent case of *United States* v. *P. J. Carlin Const. Co.* (C. C. A., 2nd Cir., 1915) 224 Fed. 859, belongs to this latter class of cases, and there the court decided that a binding valid agreement existed between the parties, although the formal document contemplated was never executed. This case was undoubtedly correct in its decision, for if both intend that such a document be but a particular kind of evidence of an already binding obligation, then the court ought properly to refuse to release one party from his obligation simply because no document has been drawn up.[2]

There are, however, a large number of cases in which, as the parties have not made their intention so manifest, it is more difficult to ascer-

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[21]Williamson *v.* Osenton (1914) 232 U. S. 619.

[1]Hodges *v.* Sublett (1890) 91 Ala. 588; Las Palmas Winery and Distillery *v.* Garrett & Co. (1914) 167 Cal. 397. In Rossiter *v.* Miller (1877) L. R. 5 Ch. D. 648, James, L. J., says at page 658: "On a question of construction, different minds may differ, but, for my part, I have often felt that in cases of this nature parties have found themselves entrapped into contracts by letters which they wrote without the slightest idea that they were contracting." To the same effect Fry, J., in Bonnewell *v.* Jenkins (1877) L. R. 8 Ch. D. 70 at page 72 says: "Now if the matter were not covered by decision, it is very probable that I should feel myself drawn to the conclusion that wherever there is a reference to a future contract the letters themselves do not constitute a contract, and for this very obvious reason, that a reference to a contract as a future thing seems to negative the notion of the existence of a contract as a present thing."

[2]Whitted & Co. *v.* Fairfield Cotton Mills (C. C. A. 1913) 210 Fed. 725; Jungdorf *v.* Town of Little Rice (1914) 156 Wis. 466.